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No. 85-372

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ELAINE CHRISTENSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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Petitioners are the heirs of an Indian allottee and now own interests in her allotment. Petitioners contend that the court of appeals erred in holding that this action, in which they seek an order compelling the United States to condemn or purchase an easement to provide access to the allotment, is barred by the six-year statute of limitations in 28 U.S.C. 2401(a).

1. a. Petitioners are the heirs of Katie Martinez, a Washoe Indian, who was granted an allotment in 1933. The allotment has been held in trust by the United States since that time. The most feasible means of access to the allotment is across land that has been privately owned since 1867, and the owners of that land permitted Martinez and her husband to cross it until their deaths in 1948 and 1951, respectively. The owners denied further access at that time. Petitioners subsequently requested the Bureau of Indian

Affairs (BIA) to provide access to the allotment, and after 1972, they were represented by counsel in that endeavor. Pet. App. 1-2, 6-7.

b. In 1983, petitioners filed this action against the United States and the Secretary of the Interior in the United States District Court for the District of Nevada. Petitioners alleged that the United States has an obligation under 25 U.S.C. 348 to furnish unrestricted access to the allotment. They sought a declaratory judgment to that effect; a writ in the nature of mandamus requiring the Secretary of the Interior to purchase or condemn under state law a right-of-way across private land that would give them access to the allotment; and damages for the deprivation of the use of the property in the past. Petitioners asserted a right of action under 25 U.S.C. 345, which provides that any persons of Indian descent who claim to be entitled to an allotment may commence an action against the United States in the proper district court of the United States. Pet. 4; Pet. App. 2, 7-8.

The district court granted the government's motion to dismiss the complaint. Pet. App. 6-10. It held that the suit is barred by the statute of limitations in 28 U.S.C. 2401(a), which provides (with one exception not relevant here) that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In the district court's view, petitioner's right of action accrued in 1951, when the privilege of access that had been exercised by Martinez and her husband was revoked, because petitioners admittedly were aware at that time of the effect of those changed circumstances on the allotment. Accordingly, the court held that this suit—which was filed in 1983, far more than six years after the cause of action first accrued—is barred by 28 U.S.C. 2401(a). Pet. App. 9-10.

c. The court of appeals affirmed. Pet. App. 1-5. Following its prior decision in *Loring* v. *United States,* 610 F.2d 649, 650 (9th Cir. 1979), the court of appeals held that the statute of limitations in 28 U.S.C. 2401(a) applies to actions brought by Indians against the United States under 25 U.S.C. 345. Pet. App. 3. The court of appeals also rejected petitioners' contention that 28 U.S.C. 2401(a) applies only to suits for money damages under the Tucker Act and therefore does not bar equitable relief. The court acknowledged that a six-year statute of limitations had been contained in 28 U.S.C. (1946 ed.) 41(20) (the Tucker Act provision applicable to district courts) and not in 28 U.S.C. (1946 ed.) 41(24) (which conferred jurisdiction on the district courts over suits for allotments). The court held, however, that the 1948 revision of Title 28 made the six-year limitations period in 28 U.S.C. 2401(a) applicable to "every civil action" against the United States, including actions under 25 U.S.C. 345 for equitable relief. See Pet. App. 4, citing *Walters* v. *Secretary of Defense,* 725 F.2d 107, 113 (D.C. Cir. 1983), and *Werner* v. *United States,* 188 F.2d 266, 268 (9th Cir. 1951). Finally, the court concluded that petitioners' argument that the limtations period in 25 U.S.C. 2401(a) should not be invoked against Indians because of the special trust relationship between the United States and Indians was foreclosed by the Ninth Circuit's prior decisions in *Loring* v. *United States, supra,* and *Werner* v. *United States, supra.* Pet. App. 4-5.

2. This case presents a question concerning the application of the statute of limitations in 28 U.S.C. 2401(a) to actions brought by Indians against the United States. Somewhat related questions are presented in *United States* v. *Mottaz*, petition for cert. pending, No. 85-546, and we therefore suggest that the petition in this case be held and disposed of in light of the Court's disposition in *Mottaz.*

In our view, *Mottaz* presents a more suitable vehicle than does this case for the Court's consideration of the application of federal statutes of limitations to such suits. The only argument petitioners advance for avoiding the statute of limitations in 25 U.S.C. 2401(a) is based on the 1948 revision of Title 28 of the United States Code. See Pet. i, 7-11. They point out that prior to 1948, the paragraph that conferred Tucker Act jurisdiction on the federal district courts had contained a six-year statute of limitations (see 28 U.S.C. (1946 ed.) 41(24)), but the paragraph that conferred jurisdiction over actions involving a right to allotments had not (see 28 U.S.C. (1946 ed.) 41(24)). Petitioners argue that 28 U.S.C. 2401(a) therefore should also be limited to suits under the Tucker Act.

The Eighth Circuit in *Mottaz* did not accept the argument that 28 U.S.C. 2401(a) applies only to suits for money damages under the Tucker Act, and that argument has been rejected by all the courts of appeals that have considered it. *Geyen* v. *Marsh*, No. 84-4607 (5th Cir. Nov. 5, 1985), slip op. 472-473; *Walters* v. *Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983), quoting *Werner* v. *United States*, 188 F.2d 266, 268 (9th Cir. 1951). See also *Impro Products, Inc.* v. *Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983), cert. denied, No. 84-170 (Oct. 29, 1984); *Boruski* v. *United States*, 493 F.2d 301, 304 n.5 (2d Cir.), cert. denied, 419 U.S. 808 (1974); *Screven* v. *United States*, 207 F.2d 740, 741 (5th Cir. 1953). This uniform view of the courts of appeals is correct. By its terms, 28 U.S.C. 2401(a) applies to "every civil action commenced against the United States" (with the exception of suits under the Contract Disputes Act of 1978), while the six-year limitations period in 28 U.S.C. (1946 ed.) 41(24) expressly applied only to suits "under this paragraph"—*i.e.*, under paragraph 41(24), which conferred Tucker Act jurisdiction on the district courts. Because there is no conflict among the circuits with respect to this issue regarding the effect of the 1948 revision of Title 28, and

because this is the only issue petitioners present for review (Pet. i, 7-11), plenary review is not warranted in this case.

In *Mottaz,* by contrast, the Eighth Circuit held that the generally applicable statute of limitations in 28 U.S.C. 2401(a) is inapplicable to a claim by an Indian based on an allegedly void transaction, in light of what the court believed to be special considerations deriving from the protection afforded Indian lands. *Mottaz* v. *United States,* 753 F.2d 71, 73 (8th Cir. 1985). As we explain in the petition in *Mottaz* (at 16-17),* that holding conflicts with the consistent holdings of the Court of Claims and Federal Circuit that the parallel statute of limitations in 28 U.S.C. 2501 applies to suits by Indians in the same manner as it applies to suits by other claimants, notwithstanding the existence of a fiduciary relationship. *Mottaz* also involves issues concerning the proper basis of jurisdiction over suits by Indians against the United States to resolve disputed questions of title or to recover money damages for actions concerning the administration and sale of allotments. These questions are of broad importance and warrant review by this Court, but they would not be resolved if the Court granted review in this case but not in *Mottaz.* By the same token, the respondent in *Mottaz* has presented in support of the Eighth Circuits' judgment in that case the same argument petitioners advance in this case concerning the 1948 revision of Title 28. See 85-546 Br. in Opp. 16-19. There accordingly would be no reason to grant review here as well even if the question petitioners present independently warranted review by this Court.

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*We have furnished counsel for petitioners with copies of our certiorari petition and reply brief in *Mottaz.*

It is therefore respectfully submitted that the petition in this case should be held and disposed of in light of the Court's disposition in *United States* v. *Mottaz*, petition for cert. pending, No. 85-546.

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